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CONCISE STATEMENT OF THE CASE

The plaintiff in the court below brought a bill in equity to restrain the defendant, the chief of police of Manchester, New Hampshire, from enforcing the hawkers and peddlers act (chapter 102, Laws of 1931 of the State of New Hampshire) against the plaintiff's canvassers. Originally the plaintiff prayed for temporary relief and a preliminary injunction but later waived these prayers.

In part the plaintiff alleged that the statute contravened article 4, section 2 of, and article 14 of the amendments to the Constitution of the United States in that, by reason of the alleged arbitrary and discriminatory character of sections 3 and 11 of said statute providing for certain exceptions and exemptions, he was denied the equal protection of the laws, the rights, privileges and immunities granted to the citizens of the state of New Hampshire and his property was taken without due process of law. He alleged that his business would suffer irreparable damage by reason of the enforcement of this law against him and his canvassers.

The defendant moved to dismiss the bill because the value of the subject matter did not exceed the sum of three thousand dollars, because the plaintiff had a plain, adequate and complete remedy at law and because of want of jurisdiction in equity and in further answer denied that the act was in whole or in part unconstitutional. The defendant further contended that if the act was in part unconstitutional nevertheless such part as was held unconstitutional was severable from the balance of the act which should remain in force.

The district court of its own motion established a specially constituted court of three judges to hear the issue whether a permanent injunction should be granted. The court ruled that the entire act was unconstitutional and that section 11 of the act violated article 4, section 2 of the Constitution of the United States and that sections 3 and 11 of the act violated section 1 of the fourteenth amendment to the Constitution of the United States.

On November 29, 1932 the court entered the decree enjoining the defendant and his officers from enforcing the act against the plaintiff and his dealers in connection with their selling of Air-Way Vacuum Cleaners and parts. The defendant appealed to this court.

This court dismissed the appeal on jurisdictional grounds on March 20, 1933. The defendant appealed to the circuit court of appeals and that court affirmed the decree of the district court. The defendant now appeals to this court and assigns as errors the rulings of the courts below that sections 3 and 11 of the act were unconstitutional and that the act was unconstitutional in whole and filed his definite statement of the points on which he intends to rely (page 52, transcript of record) and intends to urge these same points before this court.

This court further requested argument of the jurisdictional question whether the amount in controversy is such as to sustain the jurisdiction of the district court. The appellant denies that the district court had jurisdiction and respectfully submits that the decree of the circuit court of appeals should be reversed and that the decree of the district court should be vacated, with judgment for the appellant with costs.

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A

American Sugar Refining Co. v. Louisiana, 179 U. S. 89, 92. 11

B

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Province Laws of New Hampshire 1718, chapter 3 10
Laws of 1893, chapter 65, section 5 18
Laws of 1919, chapter 24, section 1 18
Laws of 1919, chapter 140 15
Special Session 1919, chapter 1 15
Laws of 1925, chapter 153, section 1 18
Public Laws 1926, chapter 60, sections 1, 2, 4, 26 15, 16
Public Laws 1926, chapter 106, sections 19, 20 15
Public Laws 1926, chapter 202, section 5 15
Laws of 1931, chapter 165 16

SPECIFICATION OF ASSIGNED ERRORS INTENDED TO BE URGED.

1. The court erred in holding that the statute of the state of New Hampshire enacted April 14, 1931 entitled "An Act Relating to Hawkers and Peddlers" is in entirety in contravention of the Constitution of the United States, especially of article IV, section 2 and of the fourteenth amendment to said Constitution and therefore is in entirety unconstitutional and void.

2. The court erred in holding that section 3 of said act is in contravention of the Constitution of the United States, especially of article IV and section 1 of the fourteenth amendment to said Constitution.

3. The court erred in holding that section 11 of said act is in contravention of the Constitution of the United States, especially of article IV, section 2 and of section 1 of the fourteenth amendment to said Constitution.

4. At the direction of this court the appellant contends and will argue that the district court did not have jurisdiction over the controversy because the value of the subject matter did not exceed the sum of three thousand dollars.

5. Because of the aforementioned errors the court erred in refusing to grant the motion filed by the defendant to dismiss the bill in equity.

ARGUMENT

A.

THE VALUE OF THE SUBJECT MATTER IN CONTROVERSY DOES NOT EXCEED THE SUM OF THREE THOUSAND DOLLARS.

The district court found that the amount in controversy exceeded three thousand dollars by the application of the principle of capitalizing the annual license fees.

The circuit court of appeals found it unnecessary to apply this principle in order to fulfill the jurisdictional requirement. It stated that the value of the object to be gained is the test of the amount involved and that this object is the right to conduct the business free from wrongful interference by the appellant. The circuit court of appeals then fell into plain error. It found that the jurisdictional requirement was satisfied on the reasoning that the object to be gained was the value of the plaintiff's business in the entire state of New Hampshire.

The object to be gained however is the plaintiff's right to conduct his business in the city of Manchester free from wrongful interference by the appellant. It is the value of this right which must exceed three thousand dollars. This is not a suit against state officials embracing state wide jurisdiction. It is a suit against the officials of the city of Manchester.

The appellant contends that he is not interfering with any property right of the plaintiff whose agents peddle from door to door. "The act of strangers in going upon private property uninvited and ringing door bells is not in our judgment a property right." *Town of Green River* v. *Fuller Brush Co.*, (C. C. A.) 65 Fed. 2d, 112 (1933).

Unless the principle of capitalizing license fees is applicable the evidence clearly shows that the value to be placed on the interference of the Manchester police is vague and conjectural and does not exceed three thousand dollars.

At the hearing in the district court the plaintiff did not produce his records to support his allegations and to serve as a basis for cross examination. Counsel for the respondent therefore agreed that a deposition as to the actual losses might be submitted to the

court at a later period. Ratta's general testimony concerning the loss he attributed to the respondent was to be made more specific by the later introduction of figures showing his actual loss attributable to the respondent. In order to present figures showing the actual loss the plaintiff called upon Frank J. Haessler, accountant for the Air-Way Electric Appliance Corporation. Haessler's figures as submitted in his affidavit and supplementary affidavit contradict and disprove statements made by Ratta at the hearing. It must be kept in mind that Ratta's territory covered western Massachusetts, Vermont and New Hampshire and that the jurisdictional amount can only be satisfied by showing that in the city of Manchester alone the value of the respondent's wrongful interference in the plaintiff's right to conduct his business is over three thousand dollars. Statements quoted hereafter are from the statement of evidence as agreed upon by the parties and printed on page twenty-seven of the transcript of record.

Ratta testified "In May and June 1931 his business suffered a slump, the reason being the enforcement of the hawkers and peddlers law against the agents whereby they had to get a license or sell by sample and deliver at a future date." Haessler's figures for the plaintiff show just the opposite. There was no slump in Manchester. The Manchester business in the last half of 1931 increased over the first half of 1931 although the plaintiff's business in the balance of New Hampshire, in Vermont and in Massachusetts slumped badly. Instead therefore of showing that the respondent wrongfully interfered with the plaintiff's business in Manchester in the amount of three thousand dollars Haessler's figures show beyond doubt that the Manchester business increased.

Ratta further stated that he could not hire experienced salesmen because they did not wish to do business by the method of sale by sample. "All that he could employ as agents were men without experience who had been out of work for a long time, men that were desperate." In Manchester however, in the first half of 1931 when no hawkers and peddlers act was being enforced against Ratta, he had an average of six dealers with an average gross sales per dealer of $312.10. Presumably these dealers were experienced men. In the last half of 1931 in Manchester, when the hawkers and peddlers act was being enforced and when Ratta had to do business by the method of sale by sample, he had the same average of six dealers whose average gross sales per dealer were $321.50.

Apparently therefore the inexperienced and "desperate" dealers selling by sample and averaging $321.50 per dealer in the latter half of 1931 were more profitable to Ratta than the six experienced dealers making delivery at the time of sale in the first half of 1931 whose average gross sales per dealer were only $312.10. In all events in the city of Manchester Ratta did a better business in the latter half than in the first half of 1931 and Manchester is the only part of his territory showing a favorable increase for this period. It is difficult therefore to understand how the respondent wrongfully interfered with the plaintiff's business in Manchester to the amount of three thousand dollars. If the respondent did wrongfully interfere in Manchester it was for the benefit of Ratta.

Ratta further stated "During 1931 and 1932 the Vermont business showed a profit. The Massachusetts business carried along fairly well. The Massachusetts and Vermont business during 1931 and 1932 has held up to the average production before whereas in New Hampshire and in Manchester during this period the business decreased." Haessler submitted no figures allocating the profit for any particular district or territory. He said he was unable to do so. The figures he did submit show an increase in the Manchester business in the latter half of 1931 over the first half of 1931 and a drop in the gross sales of western Massachusetts business of approximately 75% in the same period and a drop in the Vermont gross sales of approximately 31% in the same period. These figures show beyond all doubt that the Massachusetts and Vermont business during 1931 and 1932 did not hold up to the average production before and clearly indicate that Ratta's testimony is unreliable. He further stated "The results of the business in Ratta's entire territory during the first half of 1931 showed losses of thirteen hundred dollars and for the second half of 1931 a loss of forty-seven hundred dollars and during that time Massachusetts and Vermont at least held their own. Ratta knows of nothing else except the enforcement of this act to cause the loss." This statement, taken in connection with Haessler's figures showing a drop of 75% in the Massachusetts gross sales and a drop of 31% in the Vermont gross sales for the second half of 1931, conclusively indicates that Ratta erred. Ratta cannot blow hot and his own accountant blow cold and expect the court to believe both. It comes down to the question of who the court should believe — Ratta or his accountant. The figures speak for themselves.

Ratta further stated that "The situation in Manchester affected his business elsewhere because he trained and hired all his men for New Hampshire at the Manchester office and not having the proper number of men functioning in Manchester it seemed to break down the morale of new men." Haessler's figures show that Ratta averaged six dealers in the first half of 1931 and six dealers in the latter half of 1931. Presumably six dealers were the proper number in the first half of the year and he kept the same number during the latter half, consequently there is no basis for his statement.

Clements, Ratta's manager, testified that "In the city of Manchester alone the volume of sales was probably 25% in the last six months of 1931 compared to the volume done in the first six months of the same year." Haessler's figures show that instead of a loss of 75%, as Clements would have the court believe, there was a slight increase.

In view of the Manchester business holding up in the latter half of 1931 and the business in the other districts of Ratta's territory showing a sharp decrease it would appear that Ratta suffered no loss in Manchester.

The truth of the matter is clear. Ratta's loss was due to unfavorable business conditions. The plaintiff's Manchester business, in which we are most interested, dropped from $11,044.50 in 1930 to $1,902.60 for the first half of 1931 when no hawkers and peddlers act was in force. Prorating his 1930 business this shows a drop of some 65% in Manchester. In the last six months of 1929 he showed a profit of $11,004.57 for the entire territory of western Massachusetts, Vermont and New Hampshire. His profits then fell to $10,384.30 for the entire year of 1930. Prorating his 1929 profits this shows a drop of 52% for the year 1930. For the first half of 1931, when the hawkers and peddlers act was not in force, Ratta's profits were completely eliminated and he showed a net loss of $627.66, or a drop of 112% from the preceding six months. His business was on the skids then before the hawkers and peddlers act was passed. That is the reason for his extra efforts and for hiring a new manager. He should not now be able to say that his loss was caused by the defendant's wrongful interference.

It must be kept in mind that the fee is exacted from the individual hawker and peddler. If the complainant pays the fees of his agents he does it under no legal obligation but as a volunteer. He cannot attribute his loss, if any, to the enforcement of this state

law against his agents. Such loss is attributable to his own choice of voluntarily assuming the obligations of his agents. The amount of these obligations is the total of the license fees he pays.

The district court found that by capitalizing an expenditure of three hundred dollars, which the complainant would pay for six licenses in Manchester, the amount would exceed three thousand dollars. The court applied this principle under the authority of *Western & Atlantic R. R.* v. *Railroad Commission*, 261 U. S. 264, 267. In that case however the court held if the injury to be enjoined is *permanent* the amount of controversy may be found by capitalizing the annual detriment from it. There is nothing permanent in the nature of the investment in the present case. The fees required are annual fees. The plaintiff may feel inclined to pay them this year and not next year. He may feel inclined to do business in New Hampshire this year and not next year. He may feel inclined to pay the fees this year and make his agents pay them next year. The legislature may abolish or diminish the amount of the fee. He has made no permanent investment which would enable the court to apply the principle of capitalization.

It is therefore submitted that the value of the subject matter in controversy does not exceed the sum of three thousand dollars and that the district court therefore failed to have jurisdiction.

B.

THE CLASSIFICATIONS UNDER THE PROVISIONS OF SECTION 3 OF THIS ACT DO NOT VIOLATE SECTION 1 OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

I. The power which the legislature of the state of New Hampshire has exercised in its regulation of hawkers and peddlers is authorized by the police powers of the constitution.

Emert v. *Missouri*, 156 U. S. 296.
Baccus v. *Louisiana*, 232 U. S. 334.
Singer Sewing Machine Co. v. *Brickell and Alabama*, 223 U. S. 304.

Wagner v. *City of Covington*, 251 U. S. 95.
Town of Green River v. *Fuller Brush Co.*, C. C. A., 65 Fed. 2d, 112 (1933).
Ex parte Crowder, 171 Fed. 250.
State v. *Angelo*, 71 N. H. 224.
State v. *Montgomery*, 92 Me. 433.

II. The classifications are based on reasonable distinctions.

"A State 'may direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses, and it may do so none the less that the forbidden act does not differ in kind from those that are allowed * * *. If a class is deemed to present a conspicuous example of what the legislature seeks to prevent, the Fourteenth Amendment allows it to be dealt with although otherwise and merely logically not distinguishable from others not embraced in the law.'" *Hall* v. *Geiger-Jones Co.*, 242 U. S. 539, 556.

See also:

Central Lumber Co. v. *South Dakota*, 226 U. S. 157, 160.
Quong Wing v. *Kirkendall*, 223 U. S. 59, 62.
Rast v. *Van Deman and Lewis*, 240 U. S. 342, 357.

The legislature has distinguished the method of selling as well as the articles sold. The act does not apply to "wholesalers or jobbers selling to dealers only, nor to commercial agents or other persons selling by sample, lists, or catalogues." The courts below held that this classification established an arbitrary exception.

Wholesalers, jobbers and commercial agents selling by sample, lists or catalogues make delivery of their merchandise subsequent to their order whereas the hawker and peddler delivers his articles contemporaneous with the order. The class excepted transacts their business with persons familiar with the goods sought to be sold and the opportunity for fraudulent sales is much less than in the case of direct sales to the uninformed and often gullible public. The legislature has believed that mischief exists in the latter type of cases. These distinctions are based on logic and fact and have been repeatedly sustained by the courts.

In *Wagner* v. *City of Covington*, 251 U. S. 95, 103, the court said:

> "The distinction between state regulation of peddlers and the attempt to impose like regulations upon drummers who solicit sales of goods that are to be thereafter transported in interstate commerce, has always been recognized."

Robbins v. *Shelby District*, 120 U. S. 489.
Crenshaw v. *Arkansas*, 227 U. S. 389, 396.
People v. *DeBlaay*, 137 Mich. 402, 405.
Hays v. *Commonwealth*, 107 Ky. 655; 55 S. W. 425.

The legislature has further classified in providing in section 3 that the act shall not apply to any person selling provisions, agricultural implements, fruit trees, vines, shrubs, books, newspapers, pamphlets, the products of his own labor or the labor of his family and the product of his own farm or the one which he tills, the manufacturers of furniture and ladders excepted.

In *State* v. *Montgomery*, 92 Me. 433, 441, the court discussed the question of the constitutionality of exceptions of fruit, fruit trees, provisions, live animals, brooms, agricultural implements, fuel, newspapers, books, pamphlets and agricultural products and said:

> "It is undoubtedly true that police regulations of this kind, to be valid, must be uniform, and must not discriminate against one class and in favor of another. * * * Is this right abridged by this statute? * * * We do not think so. If one may peddle freely the products of his own labor, so may all. The products may be unlike, but the freedom to prosecute one's own business and to peddle his own products is free alike to all. So of the other exceptions. While it may happen that various producers may peddle each the products of his own labor without license, but not of the labor of another, still we think this fairly answers the requirements of uniformity. The legislature is the sole judge of the extent to which the business of peddling should be regulated, and its conclusions are final, so

long as the burdens imposed do not bear unevenly upon citizens."

See also *Commonwealth* v. *Rearick*, 26 Pa. Sup. Ct. 384, 396, where the court held that the exception of manufacturers and producers selling their own products is constitutional.

People v. *DeBlaay*, 137 Mich. 402, 405, where the court held that the exception of manufacturers, farmers, mechanics or nurserymen selling their own products by sample or otherwise is constitutional.

In re D. C. Abel, 10 Idaho, 288, 292, where the court held that the exception of farm products was constitutional.

Kansas City v. *Overton*, 68 Kansas, 560, 565, where the court held that the exception of persons personally selling the products of their own or leased land is constitutional.

Commonwealth v. *Gardner*, 133 Pa. St. 284; 19 Atl. 550, to the same effect.

People v. *Sawyer*, 106 Mich. 428, 430; excepting mechanics and farmers selling their own products.

McKnight v. *Hodge* (Wash.), 104 Pac. 504, 506, where the court held constitutional the exception of agricultural and farm products and books, periodicals and newspapers.

State v. *Webber*, 214 Mo. 272; 113 S. W. 1054, where the court held constitutional the exception of pianos, organs, sewing machines, books, charts, maps and stationery, agricultural and horticultural products.

Ex parte Thornton, 12 Fed. Rep. 538.
Ex parte Crowder, 171 Fed. 250.

These cases and cases discussing the police powers of the state definitely establish the principle that the legislature has the power to determine how great the evil and the extent of the remedy. The question is a practical one dependent upon experience and one

which local experience should largely control. It is a question of policy for the legislature. *Tanner* v. *Little*, 240 U. S. 369.

If the legislature believes that those engaged in selling merchandise used in agriculture, such as agricultural implements, fruit trees, vines and shrubs, should not be regulated, it may be for either or both of two reasons (1) that persons engaged in the selling of such merchandise do not injure the public to the same degree that others do and (2) that more harm would be done to the public and the agricultural interests of our state by restraining the peddlers of agricultural products than would good be accomplished. It is a matter of policy for the legislature to decide.

> "It is more pressed that the act discriminates unconstitutionally against certain classes. But while there are differences of opinion as to the degree and kind of discrimination permitted by the Fourteenth Amendment, it is established by repeated decisions that a statute aimed at what is deemed an evil, and hitting it presumably where experience shows it to be most felt, is not to be upset by thinking up and enumerating other instances to which it might have been applied equally well, so far as the court can see. That is for the legislature to judge unless the case is very clear." *Keokee Consolidated Coke Co.* v. *Taylor*, 234 U. S. 224, 227.

The district court in its opinion has pointed out what it terms illustrations of "the wholly unreasonable and arbitrary character of the classifications attempted under the provisions" of paragraph three and states that "They bear no relation whatever to the proper object or subject matter of such legislation, namely, the protection of the public. They result in an arbitrary and unequal application of restrictions to persons in legal status similarly circumstanced." (page 12 of the opinion). The circuit court of appeals added more illustrations to those of the district court and came to the same conclusion.

In the first place, if the delivery is made later and the article comes from without the state clearly this state could not regulate the sale of a vacuum cleaner by sample, list or catalogue. Secondly, the history of hawker and peddler legislation clearly shows that one of the mischiefs the statute purports to hit is the contempo-

raneous sale and delivery of articles which may have been purloined. The preamble of chapter 3 of the Province Laws of New Hampshire passed May 14, 1718 states:

> "Whereas Complaint is made of great Hurt to, and the decay of Trade occasioned by Hawkers, Pedlars and Petty-Chapmen, passing to and fro, through the Country, to vend Goods, Wares, and Merchandizes; much of which was Purloined, obtained by Robbery and Stealing, so that divers Men of Trades, Handicrafts men, and others, none of the best fame, having left off the exercise of their Trades, and Businesses, turn Hawkers, Pedlars, and Petty-Chapmen. For Remedy of which Mischief:"

If there exists an interval of time between the sale and delivery the housewife has an opportunity to consider the matter and to investigate the character and reputation of the salesman and his company as well as the source of the article. As we may infer from the preamble of the 1718 law this protection to the housewife is absent when sale and delivery are contemporaneous. The present legislation assures the housewife that the holder of a license has the qualifications which she could investigate if the delivery of the article were to be made subsequent to the order.

The district court states "Without a license one may peddle provisions which would presumably include food stuffs and groceries but may not without a license sell and deliver at the time bathroom fixtures, tooth brushes or combs." (Page 11 of the opinion) We are told that this is an arbitrary distinction. In the first place provisions are a necessity and any regulation regarding the right to sell them might deprive the people in our smaller communities of their necessities. In the second place peddlers of provisions and groceries generally have a regularly established route. Their customers can rely on them from their past experience. They are generally established retail merchants who, instead of setting up a store, practice their trades by calling from door to door at the invitation of their customers and thus provide a service for the housekeeper and the public. The court may take judicial notice of the fact that the sellers of bathroom fixtures, tooth brushes and combs do not sell the necessities of life nor does the general run of dealers of such articles customarily have a long established

trade. A company selling these articles may put on a drive undertaken by a number of high powered, unknown salesmen to comb the state but the butcher and grocer are known to their community and do not attempt to put over on a susceptible public a drive on meats and groceries.

The district court further states: "He may without a license * * * peddle fruit trees, vines, and shrubs, but to peddle fir trees, onion sets or annual plants for the garden, if not the product of his own farm, he must have a license." The Supreme Court of New Hampshire has not construed fruit trees, vines and shrubs. Conceivably these exceptions and "provisions" might include onion sets, tomato plants and other annual plants. Here again the legislature has apparently decided that it would not curb agricultural interests by restricting the sale of apple trees, pear trees and other fruit trees, which compose one of our basic agricultural interests. The evils, if any, existing in the peddling of such merchandise are out-weighed by the benefits derived from their unrestrained sale.

American Sugar Refining Co. v. *Louisiana*, 179 U. S. 89, 92.

The courts object because a man may peddle wheelbarrows and hand sleds of his own manufacture but not a porch chair or a ladder. The exception of manufacturers of furniture and ladders to the general exception that one may peddle products of his own labor has been in our statute since 1897. Presumably peddlers of furniture and ladders worked an injury on the public. It may have been that the furniture and ladders sold by peddlers were unsafe, or that these peddlers were causing trouble in the state. At any rate it seems a matter for the legislature to determine whether the benefits from regulating peddlers of furniture and ladders are greater than the detriment to the public if unregulated.

The courts further object that "One may make children's toys or other articles and sell them without restriction but if he were to purchase the same class of articles from a neighbor he could not peddle them unlicensed." This is arbitrary according to the court. The distinction here is that one is not selling products of his own manufacture, of which the right to sell is clearly an incident. The hawker and peddler traditionally is a middleman, as the cases show, and unless he sells what he procures elsewhere is not a hawker and peddler. Regulation of the sale of the products

of one's own manufacture and growth and that of the family would discourage persons from making their own living with their own hands. Furthermore there is an assurance to the purchaser of the title of the goods sold.

It is submitted that these classifications are based on actual distinctions and are not unreasonable. Certainly uniformity exists in as much as all persons selling these products are exempt and all persons selling other products not covered by the exemptions are not exempt.

> "The Fourteenth Amendment is not a pedagogical requirement of the impracticable. The equal protection of the laws does not mean that all occupations that are called by the same name must be treated in the same way. The power of the State 'may be determined by degrees of evil or exercised in cases where detriment is specially experienced.' It may do what it can to prevent what is deemed an evil and stop short of those cases in which the harm to the few concerned is thought less important than the harm to the public that would ensue if the rule laid down were made mathematically exact. The only question is whether we can say on our judicial knowledge that the legislature * * * could not have had any reasonable ground for believing that there were such public considerations for the distinction made by the present law. The deference due to the judgment of the legislature on the matter has been emphasized again and again. Of course, this is especially true when local conditions may affect the answer, conditions that the legislature does but that we cannot know." *Dominion Hotel* v. *Arizona*, 249 U. S. 265, 268.

The district court and the circuit court of appeals in effect have held in this case that the legislature cannot subdivide hawkers and peddlers into further classifications for the purpose of regulating some and excepting others. They have in effect decided that the legislature cannot regulate the peddling of so called Oriental rugs, silks and French laces, the source and quality of which may be doubtful, unless it includes in the same regulation farmers who peddle their own products, the butcher and milkman going from door to door selling their necessities and the hominy and hull corn

man who has manufactured his own products. It is submitted that such a conception of the law is based neither on common sense nor legal experience.

The courts below relied on *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 559. In the Connolly case combinations in restraint of trade were held illegal in an attempt by the legislature to abolish such practices. The legislature excepted agriculturists from the prohibition of such practices. In the present case the legislature is not seeking to abolish hawking and peddling but is seeking to regulate it. In the Connolly case the legislature permitted farmers to pursue exactly the same practices which others could not legally pursue. In this case all persons in each classification are treated alike. A vacuum cleaner peddler may sell his machine without a license if he manufactured it. Farmers must be licensed if they would sell vacuum cleaners. All persons in the same legal status and similarly circumstanced are treated alike.

C.

THE PROVISION OF SECTION 11 WHICH EXEMPTS DISABLED SOLDIERS AND SAILORS AND THEIR WIDOWS FROM PAYING LICENSE FEES DOES NOT VIOLATE SECTION 1 OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

This provision differs from that of *State* v. *Shedroi*, 75 Vt. 277; *Commonwealth* v. *Hana*, 195 Mass. 262; *Marallis* v. *City of Chicago* (June 24, 1932), 182 N. E. Rep. 394 and other similar cases because (1) *all* soldiers and sailors must obtain a license and (2) only *disabled* soldiers and sailors and their widows are exempt from paying a fee. The case of *State* v. *Montgomery*, 92 Me. 433, 442, is on all fours and the court in that case relied on the distinction between granting free licenses to *disabled* veterans and requiring other veterans to pay for their licenses. Such a classification was held constitutional by the Maine court. This is the trend of modern legislation on the subject.

In Massachusetts, in the case of *Commonwealth* v. *Hana*, 195 Mass. 262, the court intimated that an exemption of all veterans from payment of license fees was unconstitutional. The Massachusetts legislature now exempts from payment of the fee "any soldier or sailor resident in the commonwealth who served in the army or navy of the United States during the world war and received an honorable discharge or a release therefrom, and who is wholly or partly disabled by reason of wounds or injury received, or disease contracted during such service." (G. L. ch. 101, s. 24.)

The basic reason for the distinction between veterans and others is shown in the dissenting opinion of the three judges in the case of *Marallis* v. *City of Chicago*, 182 N. E. Rep. 394, in which case the exemption from payment of license fees of all soldiers and sailors regardless of disability was before the court. The dissenting opinion points out that (*p.* 399):

> "The power to grant bounty to former soldiers and sailors as a class is coeval with the organization of the government under the present Constitution and has been continued without interruption to the present time. *United States* v. *Hall*, 98 U. S. 343, 25 L. Ed. 180. * * * Of course, there is no relation between the service of a soldier and the business of a peddler, but there is a relation between the duty of the sovereign growing out of the service of a soldier and the granting of privileges to him which will enable him to provide for his daily needs. That relation has been made the basis of a great deal of legislation of this character by both federal and state governments."

The dissenting opinion further justifies the classification by pointing out that many of the veterans while in the service were in the formative period of their lives, their work and studies were definitely interrupted, while those remaining at home enjoyed (*p.* 399):

> "exceptional and unprecedented opportunities for gainful employment. The soldiers came home handicapped by absence from business and schools and burdened with the baneful effects of tremendous inflation of values which set in soon after their discharge. Under the circumstances it seems

apparent that they constituted a distinct class quite competent to be distinguished from the rest of our citizenry in matters of legislation—a class created by their defense of country and the consequent deprivation of opportunity which had been open to others."

The reason for the second distinction is the physical infirmity which a disabled veteran has received while serving his country. *State* v. *Montgomery*, 92 Me. 433. No such distinction existed in the cases relied on by the court and counsel for the complainant. The disabled veteran by reason of service to his country is physically handicapped in the pursuit of his trade of hawking and peddling whereas the ordinary person suffers under no such disadvantage. The extension of the effects of this disability to the widow is based on the same policies and logic. She has shared equally in the effects of the disability of her husband so far as her husband's ability to make a living for his family is concerned.

The state of New Hampshire has provided for its disabled veterans. They have been given bonuses (Laws of 1919, chapter 140 and Special Session 1919, chapter 1). Special legislation is provided for the indigent (Public Laws, chapter 106). The state pays the expenses for their decent burial (Public Laws, chapter 106, section 20). Veterans are exempt from the payment of a poll tax in common with other persons who by reason of age, infirmity and poverty are unable to contribute towards the public charges (Public Laws, chapter 60, sections 2 and 4). Those holding not over five thousand dollars worth of real estate are entitled to a property tax exemption on the first one thousand dollars (Public Laws, chapter 60, section 26). The New Hampshire Soldiers Home is provided for the destitute (Public Laws, chapter 106, section 19). Veterans over seventy years of age may have a free hunting and fishing license (Public Laws, chapter 202, section 5).

D.

THE PROVISION EXEMPTING RESIDENTS OF THIS STATE OVER THE AGE OF SEVENTY FROM PAYING LICENSE FEES DOES NOT VIOLATE ARTICLE 4, SECTION 2 OF, AND SECTION 1 OF, THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The reason for this exemption is to give assistance to persons over the age of seventy who are presumably handicapped in their trade by reason of their age. The district court decided that this exemption violated section 1 of the fourteenth amendment and section 2 of the fourth amendment to the Federal Constitution and stated that this particular provision "is seemingly of no great practical importance as few persons of that age would be engaging in such employment." (Page 7 of opinion). The opinion of the circuit court of appeals was to the same effect.

The legislature has classified residents over the age of seventy for the purposes of poll tax exemption (Public Laws, chapter 60, section 1) and old age assistance (Laws of 1931, chapter 165). Persons over seventy of course do suffer under a disability to practice the trade of hawking and peddling and for that reason the exemption bears a relation to the purpose of the act. The chief objection seems to be that only residents of this state over seventy are exempt from payment of the license fee. The answer to this objection is, it is the state of New Hampshire who has to take care of its indigent and old folks. This provision however is trivial and if unconstitutional the court should construe it so as to enable any citizen of any state over seventy to procure a free license. The New Hampshire Supreme Court has so construed a similar provision in *Bliss's Petition*, 63 N. H. 135 where the court granted a peddler's license to a citizen of Massachusetts under a statute which permitted the clerk of the Supreme Court to grant a license "only for that county in which said person or applicant so applying holds his residence * * *." The court said (page 135):

> "The equality of privileges and immunities guaranteed by the federal constitution (art. 4, s. 2) to the citizens of each state, exempts them from any higher taxes than the state imposes upon her own citizens. The petitioner, being en-

titled to all the privileges and immunities belonging to the citizens of the several states, is entitled, within this state, to all the rights and privileges of our own citizens, and he may sell, or offer or expose for sale, here, anything which the citizens of this state can sell, offer, or expose for sale, upon the same terms and conditions, and subject to the same duties and liabilities, as the permanent residents of this state."

See also:

Quong Ham Wah Co. v. *Ind. Acc. Comm.* (Cal. 1920) 192 Pac. 1021; 12 A. L. R. 1190, 1200.

E.

IF EITHER OR BOTH CLASSES OF EXEMPTIONS AND ANY OF THE EXCEPTIONS ARE UNCONSTITUTIONAL THE REMAINDER OF THE ACT STANDS.

In the case of *State* v. *Stevens*, 78 N. H. 268, 269 the court said:

"The only provision attacked is the final clause of section 3 that such agents shall be residents of the state. But this provision is not a necessary element of the scheme of regulation provided. * * * The result, if this clause is void, therefore would not be to invalidate the whole act and permit all persons to sell without license, but merely to render nugatory that portion of the act."

See also:

East Kingston v. *Towle*, 48 N. H. 57.
Opinion of Justices, 76 N. H. 601, 605.
Bliss's Petition, 63 N. H. 135.

The cases seem to establish clearly that the method to determine whether or not the entire act should be stricken down depends on whether the legislature would be presumed to have enacted

the valid portion without the invalid. In other words is it fair to believe that the legislature would have enacted the present hawkers and peddlers law without the exemptions provided in section 11 if the legislature had known that it was without the power to make these exemptions? It seems clear that the exemptions are but a detail of the act and that the act can be enforced to carry out its purpose without the exemptions provided in section 11.

Consider the legislation on the subject. From early colonial days and from prior to 1688 hawkers and peddlers have been regulated in the province and state of New Hampshire. The fact that such regulation has been exercised for such a long period of time shows the importance of such legislation. The legislature has attempted to regulate the practice of this profession for the purpose of protecting the people of the state. Free licenses are secondary to the primary purpose of the act which is to protect the public. And that protection is not affected by the fact that certain persons are given free licenses and others are not.

The statutory history is of still further significance in indicating the legislative intention. Both of these exemptions from payment of license fees were added to an already existing hawkers and peddlers act by the process of amendment. The aged persons' exemption was added to the hawkers and peddlers act in 1925 by chapter 153, section 1. The present disabled veterans' exemption was added to the hawkers and peddlers act in 1919 by chapter 24, section 1. The original disabled veterans' exemption was added to the hawkers and peddlers law in 1893 by chapter 65, section 5. The history of these exemptions shows that the aged persons' exemption is eight years old and the disabled veterans' exemption is forty years old. Both exemptions were placed in the act by the process of amendment. Both of them were mere details and unnecessary to valid and workable acts previously in force. Until these amendments were added and for a period of over two hundred years satisfactory, workable acts regulating the hawkers and peddlers profession were in force. The amendments involved only the matter of free license fees and in no wise changed the substance and manner of the police regulations. The most reasonable conclusion to be drawn therefore is that the legislative exercise of the police power should remain in force regardless of what the court may do with the two exemptions from payment of license fees.

Similarly if the exception of manufacturers of furniture and ladders is unconstitutional it seems impossible to believe that the legislature would prefer the entire act stricken down because of the invalidity of this exception. Without it the act as a whole is enforceable and substantially conforms to the intention of the legislature. If, as the courts below have decided, all the exceptions in section three are invalid then unquestionably the act as a whole is unconstitutional but such exceptions as manufacturers of furniture and ladders and persons selling fruit trees, vines and shrubs are of minor importance and, even if void, should not thereby render the entire act void.

We respectfully submit that the decrees of the circuit court of appeals and of the district court should be reversed and that the bill in equity should be dismissed, with costs.

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